2001

Glenn Bass v. Majestic Meadows : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

GLENN BASS and LOIS BASS,

Plaintiffs-Respondents,

vs.

MAJESTIC MEADOWS, a Limited partnership, dba MAJESTIC MEADOWS MOBILE HOME PARK; TOMMY SPILKER; FLOYD TRIMBLE; EVELYN TRIMBLE; GEORGE H. ROSE; and PLANNED MANAGEMENT SERVICES, INC., a Utah corporation,

Defendant-Appellant.

Case No. 19,182

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, UTAH,
HONORABLE CHRISTINE M. DURHAM

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CASES CITED

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STATEMENT OF THE KIND OF CASE

Plaintiffs brought suit seeking damages from defendants for alleged conspiracy by defendants to dispossess plaintiffs of their mobile home and personal property. Plaintiffs also claimed unlawful and forcible entry, unlawful detainment of possession, and false and malicious statements about plaintiffs' mobile home.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Christine M. Durham on Wednesday and Thursday, January 6 and 7, 1982. Co-defendants Floyd and Evelyn Trimble were not present at the trial, nor did they respond to the complaint, and were, therefore, found to be in default. The claim against defendant Spilker was settled for a nominal fee of $1.00. During the trial the charge of conspiracy was dismissed, there being insufficient evidence.

On February 1, 1982 judgment was entered against defendants. The trial court found that defendants Trimble wrongfully forfeited their contract with the plaintiffs. It also found that defendant Planned Management Services, Inc. (hereinafter PMS), manager of Majestic Meadows Mobile Home Park, was liable under the doctrine of respondeat superior for the actions of its employee, defendant Spilker. Spilker was found to have slandered plaintiffs' title to the mobile home and to have committed trespass and forcible entry. PMS was held liable for the reasonable rental value of the mobile home for the period of trespass (10 days), and for attorney's fees for slander of title, although the court found no actual damages by reason of such slander.

RELIEF SOUGHT ON APPEAL

Defendant PMS seeks a reversal of the lower court's decision and a judgment in favor of PMS, of no cause of action.

STATEMENT OF FACTS

About the middle of October, 1976, plaintiffs and defendants Trimble entered into an agreement, whereby plaintiffs leased the Trimbles' mobile home with an option to buy. (r.209-10, 344, 392) The contract was to terminate as of October 31, 1978. (r. 496) A short time thereafter, the plaintiffs moved the mobile home into Majestic Meadows Mobile Home Park. (r. 215-18)

During the following eighteen months bad feelings developed between the plaintiffs and defendant Spilker over the plaintiffs' alleged failure to comply with some rules and regulations of the mobile home park. (r. 234, 419-20) Repeated violations of the park's rules led to a notice of termination on May 24, 1978 (r. 239-40) and a legal action for restitution in June. On August 18, 1978 a writ of restitution was issued by Judge Maurice D. Jones of the Fifth Circuit Court. (r.379, 489-90, 492) Two days before, on August 16, the plaintiffs engaged the services of Mr. Raymond W. Neidert, a real estate agent, to sell the mobile

home. (r. 358) The plaintiffs then remained in the mobile home until sometime around the 4th of October 1978. (r. 386)

Sometime during the summer months of that year, defendants Trimble somehow (the facts are in dispute) became aware of the plaintiffs being in arrears in their payments on the mobile home. (r. 256, 392, 460-461) Within a short time thereafter, defendants Trimble engaged an attorney to handle the matter for them since they lived at that time in North Dakota. (r. 310) Upon notification of the situation the plaintiffs contacted the Trimble's attorney and offered him payment in the form of a check. (r. 213-14) In attempting to certify the check, the attorney testified that the plaintiffs' bank told him there were insufficient funds to cover the check. (r. 315-16) By mid-October the plaintiffs were still in arrears. During this time defendants Trimble had made at least two trips to Utah and had visited defendant Spilker and informed him that they intended to repossess the mobile home if payments were not made by the plaintiffs. (r. 463)

About mid-October 1978, after the plaintiffs had vacated the home, Spilker became concerned about the possible theft of some of the plaintiffs' personal property which had been left in open view. (r.438-40) Spilker

discussed his concerns with PMS's attorney, Robert Baldwin, who was aware of the forthcoming repossession and had been in contact with the Trimble's attorney. After clearance from PMS's attorney, Spilker moved plaintiffs' property into the mobile home and changed the locks on October 20, 1978. (r.438-40,488)

By October 31, 1978 the plaintiffs had failed to exercise their option to purchase; on this date the contract between defendants Trimble and the plaintiffs expired under its own terms, and defendants Trimble repossessed the mobile home. In letters dated November 10, 1978, the Trimble's attorney notified the plaintiffs and their attorney that the terms of their agreement had expired and that the mobile home had been repossessed. (r. 324, 346) Four days prior, on November 6, 1978, Trimbles wrote Spilker a letter in which they notified him of their repossession of the mobile home and in which they asked him to list the mobile home for sale at $28,500. (r. 452) Spilker found a buyer for the mobile home shortly thereafter. (r. 353)

During the trial the plaintiffs' real estate agent, Mr. Neidert, claimed that Spilker had harassed him in his attempts to sell the mobile home and discouraged buyers from purchasing the mobile home. (r. 370, 372, 380) Defendant

Spilker testified that he only told prospective buyers that there were some legal uncertainties about the mobile home, and that these legal questions would need to be resolved before a purchase of the mobile home could be complete. (r. 443, 447, 457)

POINT I

THE TRIAL COURT ERRED IN FINDING SLANDER OF TITLE, THE PLAINTIFFS HAVING FAILED TO PROVE A PRIMA FACIE CASE FOR SLANDER OF TITLE.

In defining slander of title the Supreme Court of North Carolina has said:

> Slander of title of property may be committed and published orally or by writing, printing, or otherwise, and the gist of the action is the special damage sustained; and, unless the plaintiff shows the falsity of the words published, the malicious intent with which they were uttered, and a pecuniary loss or injury to himself, he cannot maintain the action. If the alleged infirmity of the title exists, the action will not lie, however malicious the intent to injure may have been, because no one can be punished in damages for speaking the truth. Cardon v. McConnell, 120 N.C. 461, 27 S.E. 109 (1897).

There are then, essentially four elements of slander of title: (1) Words actually affecting title; (2) Falsity; (3) Malice; (4) Special damages. Dowse v. Doris Trust Co., 116 Utah 106, 208 P.2d 956 (1949); McNichols v. Conejos-k Corp., 482 P.2d 432 (Colo. App., 1971) at 434.

A. TITLE.

In slander of title cases, it is obviously the plaintiff's burden to prove possession of title to the alleged slandered property, and to prove that title has been clouded by the defendant's statements. Dowse v. Doris Trust Co., supra; South Louisiana Land Co. v. Riggs Cypress Co., 119 La. 193, 43 So. 1003 (1907).

In the instant case the only evidence of title offered was an undated, handwritten Private and Personal Agreement between defendants Trimble and plaintiffs. Further evidence might have been submitted had title been an issue in the case. However, since slander of title was never plead, and in fact was never mentioned in the pleadings or during the course of the trial, no evidence to prove this particular point was ever submitted.

In regards to any cloud having been placed upon the plaintiffs' title, absolutely no evidence was offered by the plaintiffs to show that their title had been clouded by defendant Spilker's statements.

B. FALSITY.

"[I]f the alleged defamatory matter is true, an action will not lie, however malicious the intent to injure may have been." 50 Am. Jur. 2d 1067, Libel and Slander,

section 549. "For one to be liable for slander of title he must publish matter which is untrue and disparaging to another's property in land." Pender v. Dowse, 1 Utah 2d 328, 265 P.2d 644, 649, (1954).

As to the truthfulness of defendant Spilker's statements the trial court found that he "[m]ade false statements to...at least one person (Doan) interested in purchasing the property and to the plaintiffs' real estate agent." (r. 121) No person named Doan ever testified at trial. However, the plaintiffs' real estate agent, Mr. Neidert, did mention someone named Dos or Don, but he never testified that any false statements had been made:

> Q. Okay. Did you have occasion to be thwarted in any of your efforts, from your standpoint, in the sale of the home?
> A. As I understand it, the park reserves the right to okay or not okay somebody that wanted to buy the place. And I can't recall any names. At the time I didn't -- you know. Had I known it was going to happen, we would have kept records. I don't know who these people were other than the people across the street. Do you want me to get into that?
> Q. Yes. I am trying to elicit that.
> A. Yeah. We had some other people that were really interested. That was my understanding. But it was my understanding when they got back to me that the manager didn't want them in there.
> Q. All right.

> A. Or he didn't want us to sell it. That was the biggest problem. But that Dos, or Don, who lived across the street, was really interested, and he too was told by the management --
>
> Mr. Fillerup: I need foundation. (r. 363-64)

Mr. Fillerup, defendant PMS's counsel, then objected on the basis that Neidert's recitation of what someone else may have told him about what Spilker may have told them was hearsay; and, after after a lengthy argument, plaintiffs' counsel dropped the question with no evidence of any alleged false statements being received. (r.364-68)

Mrs. Bass, a plaintiff in this action, testified that she overheard a conversation between Neidert, Spilker, and the neighbors from across the street, the Daubs (r. 405, 412), in which Spilker told the Daubs there were legal problems with the mobile home. Mrs. Bass never testified Spilker said anything that affected their title to the mobile home, only that there were legal problems.

Spilker also testified about a conversation with a Mr. Daub (r. 467-69), another resident of the park who wanted to purchase the plaintiffs' mobile home below market value and then have Spilker sell the home at market value for a large profit. Defendant Spilker's testimony about this conversation and his refusal to be a party to such a scheme

contains nothing about the plaintiffs' title to the mobile home, let alone anything that might be considered as a false statement regarding the mobile home.

Whether the person to whom Spilker allegedly made false statements was named Doan, Dos, Don, or Daub, no evidence was ever received that false statements were in fact made.

As regarding false statements having been made by Mr. Spilker to the plaintiffs' real estate agent, Mr. Neidert, no evidence that the statements were false was presented. Mr. Neidert only testified that Spilker questioned whether he had a license to sell a mobile home, and that "[Spilker] didn't want anybody selling mobile homes in there." (r. 372) Mr. Neidert also testified that Spilker mentioned pending legal matters, but also stated that until the day of the trial he was never aware that there actually were legal matters concerning the mobile home. (r. 377-79) None of what Neidert testified Spilker said were false statements, nor were they statements that could in anyway affect the plaintiffs' title to the mobile home. Since Spilker's statements were true they cannot constitute slander of title. Cardon v. McConnell, supra; McNichols v. Conejos-K Corp., supra.

C. MALICE.

As to malice, statements made, even if false, cannot constitute a slander, unless the statements were made maliciously. Cardon v. McConnell, supra. Malice is an essential ingredient in a claim of slander of title. Den-Gar Enterprises v. Romero, 94 N.M. 425, 611 P.2d 1119 (N.M. App. 1980).

Even if the statements had been false, the trial judge found that there was no malice on the part of defendant Spilker:

> The court further finds that Mr. Spilker interfered with the Basses' effort to sell their trailer home prior to November 1st, 1978, and I can make no finding that that was malicious, willful, or wanton. (r. 601 emphasis added)

D. SPECIAL DAMAGES

No cause of action exists for slander of title absent proper pleading and proof of special damage:

> The rule is generally recognized that special damage is a necessary element of a cause of action for slander of title or disparagement of goods or property and that the special damages recoverable must be such as proximately flow from the slander uttered. General damages are not presumed to result from the disparagement or defamation, and there could be no recovery if resultant injury is not shown. 50 Am. Jur. 2d. 1065, Libel and Slander, section 546. See also Jemez Properties, Inc. v. Locero, 94 N.M. 181, 608 P.2d 157, 162 (1980) ("[s]pecial damages must be pleaded as well as proved in a suit for slander of title.")

Utah law is in complete accord with the foregoing. In Dowse v. Doris Trust Co., supra; the Utah Supreme Court outlined the following as necessary elements to prove a cause of slander of title:

> Although the falsity of the statement and malice or lack of the privilege to do so in the disparagement of title are two important elements in a suit for slander of title, a plaintiff in a suit for slander of title, unlike a plaintiff in a suit for libel and slander of his person, cannot prevail unless he alleges and proves a pecuniary loss resulting from the act of the defendant. Dowse v. Doris Trust Co., supra at 958 (emphasis added)

In another slander of title case, Western States Title Insurance Co. v. Warnock, 18 Utah 2d 70, 415 P.2d 316 at 318 (1966), this Court held that "[w]ithout an allegation of special damage there can be no recovery on what is alleged in the plaintiff's [complaint]." These examples show that it is a well established rule that special damages must be plead and proved in slander of title cases, "[t]he gist of the action [being] the special damage sustained." Cardon v. McConnell, supra.

In the instant case the plaintiffs failed to plead and prove special damages. The only claim in the plaintiffs' complaint which remotely resembles one for special damages is that "[p]laintiffs were unable to sell [their mobile

home] and have been completely dispossessed thereof" (r. 6) and that plaintiffs suffered the loss of certain personal property. No other allegation of special damage can be found. Regarding this claim for special damage for failure to sell the mobile home, the trial court held that the plaintiffs failed to adequately prove it resulted from the defendants' actions:

> Plaintiffs failed to establish with the required degree of certainty that their failure to sell the property and obtain the profit therefrom was proximately caused by the defendants' actions, and therefore no damages can be awarded to compensate them for a lost sale. (r. 162)

Attorney's fees alone, absent special circumstances, cannot constitute the special damages necessary to be proved to find a slander. Dowse v. Doris Trust Co., supra; and Western States Title Insurance Co. v. Warnock, supra.

In her conclusions of law the trial judge noted that the plaintiffs were entitled to attorney's fees based upon the court's opinion in Dowse v. Doris Trust Co., supra.

In Dowse v. Doris Trust Co., the defendant filed for record an instrument which unequivocably and indelibly clouded and slandered the plaintiff's title. The lower court awarded the plaintiff attorney's fees incurred in expunging the cloud on his title as an element of special damage, and

the Supreme Court affirmed. In Dowse v. Doris Trust Co. because the slander of title was in written form and filed for record against the plaintiff's title to the property, the slander was continuing, and the plaintiff had no choice but to bring an action to remove the cloud. The expenditure of attorney's fees associated with such an action, the court concluded, was a reasonably foreseeable special damage which resulted from the defendant's conduct.

The present case is completely distinguishable because the plaintiffs were not required to bring this action to expunge a continuing cloud on their title to the mobile home. Indeed, they did not bring this action to expunge a cloud on their title at all.

E. FAILURE TO PLEAD OR PURSUE A CLAIM FOR SLANDER OF TITLE

The final, and the most perplexing point of all, is that neither the term "slander of title" nor the concept of "slander of title" was even mentioned in the pleadings or throughout the trial, including the closing arguments of counsel. In fact, counsel for plaintiffs conceded in closing that plaintiffs were alleging only the causes of action as originally in the complaint. (r. 583). Also, when Judge Durham, the trial judge, made her initial findings, she made absolutely no mention of "slander of title" (r. 600-610). The issue of

slander of title did not even arise until Judge Durham entered her ruling. (r. 120-122, 121). Obviously defense counsel was surprised by the ruling and eventually objected thereto, (r. 130) but even counsel for plaintiffs, in the subsequent hearing on attorney's fees held before Judge Fishler, conceded that he had never entertained the concept of slander of title in the lawsuit. (r. 616) As a result, plaintiff did not press the issue of slander of title at the trial, and consequently failed to present evidence sufficient to justify a finding of slander of title.

POINT II

THE TRIAL COURT ERRED IN AWARDING DAMAGES TO PLAINTIFFS FOR THE 10 DAY PERIOD IN OCTOBER, 1978.

The trial court found that:

> (3) ... [Spilker] committed a trespass, conversion of, or forcible entry upon the property for the period between October 20, 1978 and the date Trimbles "forfeited" (albeit wrongfully) the plaintiffs contract. Plaintiffs are entitled to judgment against Spilker's employer, Planned Management Services, Inc., for the reasonable rental value of the property for the period of conversion or trespass, ...
>
> (4) The reasonable rental value of the property was the same amount being paid to Valley Bank on Trimbles' mortgage. That amount should be prorated to determine the amount of judgment as set forth in Conclusion #2 about. [#3 above.] (r. 162)

These conclusions of the trial court are apparently

These conclusions of the trial court are apparently based upon the findings of fact that:

> (4)(b). [Spilker] changed the locks on the property on or about October 20, 1978, without the plaintiff's consent or permission. Removed the lockbox belonging to plaintiff's realtor, thereby denying to plaintiffs and their agent all access to the property. Made no tender or delivery of, or effort to tender or deliver, the keys to the new locks.
>
> (5) Plaintiffs did not at any time abandon or surrender the property. When they moved out, it was with the intent to permit their realtor to show the property and to sell it in their behalf. They were entitled to possession. There was no evidence of any intent to abandon, and defendant Spilker's changing of the locks was not in good faith. (r. 161)

The problem with the trial court's findings is that they are not supported by the record, and in fact the record indicates just the contrary. Granted, there was testimony by plaintiffs about Spilker's attempts to get the plaintiffs to list their mobile home for sale through him, and he may have represented that there were pending legal problems with the mobile home in light of the writ of restitution that had been issued, but Mrs. Bass, herself, admitted in cross examination that neither she nor her husband, nor anyone she could identify, had actually been deprived access to the home. She further indicated that neither she nor her husband made any demand to enter the mobile home after the locks were changed.

Q. [by Mr. Fillerup] All right. It's true, isn't it, that Mr. Spilker never told you that you absolutely couldn't sell your mobile home if you didn't list it with him? He never told you that?

A. [Mrs. Bass] Not in those words, no.

Q. He just tried to encourage you to list it with him?

A. He told us that we needed to go through him to sell it. Take it any way you want to.

Q. You were never present when Mr. Spilker or anyone ever, himself, ever prohibited anyone from viewing your mobile home, were you?

A. I was present on the day with Wally Neidert and the Daubs.

Q. Of course they were already in the park and had gone through the mobile home?

A. As far as I know, they had already gone through the mobile home.

Q. And you personally weren't present or don't know, or your own personal knowledge, of any incidents where anyone was prohibited from seeing your mobile home?

A. No.

Q. You also have no knowledge or were never present where you made demand to enter the mobile home and refused [sic] to do that?

A. No. We were advised by Mr. Ungricht not to do that.

Q. So your attorney told you not to go back?

A. He told us not to contact Mr. Spilker or anybody else and make demands to go into the home after they changed the locks.

Q. I see. And so you never made any demand after the locks were changed?

A. No. We left that in his hands. He said he would take care of that.

Q. So you don't know whether you could have or couldn't have gone back and picked up your furnace and hot water heater, for instance, personally?

A. Personally, I guess not. I guess I'd have to say I didn't make the demands, nor my husband. (r. 411 - 413)

The testimony of Mr. Spilker is consistent with that of Mrs. Bass:

Q. [by Mr. Fillerup] Now, Tommy, did you ever tell either the guard or anyone else associated with Planned Management not to allow the Basses access to their mobile home?
A. No, sir. I was very careful in that.
Q. Did you ever have any demand made upon you by either Mr. or Mrs. Bass to enter their mobile home?
A. Never.
Q. They never even asked you if they could?
A. I never saw them, sir.
Q. How about after the locks were changed? Did you ever have anybody request that they be allowed to enter the mobile home?
A. Never.
Q. On behalf of the Basses?
A. No, sir.
Q. How about Mr. Neidert? Did you ever deny him access to the mobile home?
A. No, sir. I told him to contact us, and my wife was present. When I asked him to take the signs out I told him to please contact us, I told the guard to have him contact us day or night, sir. That was instructions they had, too, if he ever came in. (r. 456 - 457)

Mr. Neidert, who also testified on behalf of the plaintiffs, admitted that he had never been denied access to the mobile home after the locks were changed:

Q. [by Mr. Fillerup] All right. Thank you. It's true, isn't it, Mr. Neidert, that you personally were never denied access to the mobile home when you requested it?

A. Well, I never had to request it, because I had a key to the place. But I was denied when the key box was taken off.

Q. Temporarily?

A. I never got in after that.

Q. Did you ever demand to get in after that?

A. I was kind of out of the picture by that time.

Q. But did you ever demand to get in like [after] that?

A. Not that I recall. I don't know. I would doubt it. I don't know.

Q. You never went to Mr. Spilker after the time the locks were changed and said, "I want to get in there and show somebody that mobile home"? You never did that, did you?

A. I honestly don't know.

Q. Prior to the time the locks were changed, though, the guard or Mr. Spilker or someone else never denied you any access, stopped you at the entry and said, "I'm sorry, but you can't go in there anyway"?

A. No. No one ever stopped me. But they just tried to discourage me. (r. 383 - 384)

Mr. Bass testified that on one occasion the guard told him that he had no business in the park and not to come in, but he could not identify the date or whether it was after the locks were changed. (r. 275 - 277).

There is no question that Tommy Spilker changed the locks on the coach on October 20, 1978. He testified that he did so at the direction of Bob Baldwin, attorney for PMS. He further testified that the reason for the lock change was because he had to break off the old lock to move a water heater and furnace inside that had been left behind by the

Basses. He was concerned that the items had been left out where they could be damaged or stolen. (r. 438 - 440).

The evidence presented by plaintiffs as to why Mr. Spilker changed the locks concerned what Spilker may have said to prospective buyers and Mr. Neidert, the inference being that he changed the locks to prevent a sale of the mobile home. However, absolutely no evidence was ever offered to show that Spilker or PMS ever denied plaintiffs, Mr. Neidert, or prospective purchasers any access to the mobile home. In fact, Spilker testified that he went to Mr. Neidert's office after the locks were changed to inform Neidert of what he had done. (r. 457a - 458).

The court concluded, however, that by changing the locks Spilker denied to plaintiffs and their agent all access to the property. Such conclusion is not supported by any evidence, and is clearly in error.

Juxtaposed to the above problem is the fact that a writ of restitution had issued in favor of PMS against the plaintiffs in July of 1978, and that some 20 days before the locks were changed, plaintiffs had moved from the premises. Could Spilker have unlawfully detained the plaintiffs from the property when they were not possessing or attempting to

possess it and when they had no right to possess it in the first place?

The finding by the trial court that PMS is responsible to plaintiffs for the trespass, conversion, or unlawful detainer is simply not supported by any evidence adduced at trial and as a result the judgment against PMS should be set aside.

CONCLUSION

The court's finding of slander of title is erroneous, both in law and fact, was never plead or tried by plaintiffs, and appears to be an afterthought of the trial court to find a way to award attorney's fees to plaintiffs, even though the court found no actual damage had occurred. As a result, the award of attorney's fees must be set aside. Additionally, the award of damages for trespass, conversion or unlawful detainer is erroneous. This Court should reverse the judgment of the trial court and enter judgment in favor of defendant PMS, no cause of action.

DATED this 14th day of July, 1983.

ROBERT C. FILLERUP
Attorney for Appellants

MAILING CERTIFICATE

I hereby certify that I mailed two (2) copies of the foregoing brief of Defendant-Appellant to Mr. John B. Hiatt, Attorney for Respondents, 5085 South State Street, Murray, Utah 84107, this 14th day of July, 1983.

Marianne Hohrein
SECRETARY